RECENT DECISIONS.

AGENCY—APPARENT AUTHORITY—TRADE CUSTOM. The plaintiff's general agent, being intrusted with possession of, and having authority to receive in payment, notes payable to the plaintiff, sold at a reduced price and delivered to the defendant a piano, taking a note payable to himself. After discounting the note, he appropriated the proceeds to his own use. *Held*, the plaintiff could recover possession of the piano, since purchasers were bound to know that it was not customary for piano agents to have authority to take notes payable to themselves. *Baldwin* v. *Tucker* (Ky. Dec. 1901) 65 S. W. 841.

It would seem that the agent, being intrusted with possession of the property and having authority to sell on credit, passed a good title as the form of the note would determine only the manner of giving credit. Thus an insurance agent, having authority to waive conditions in writing can, as to third parties without notice of the limitation, make a good waiver by parol. *Walsh* v. *Hartford Ins. Co.* (1878) 73 N. Y. 5. The court avoided this consequence of the doctrine of apparent authority by holding that usage in the piano trade was binding upon innocent purchasers. This result finds authority in numerous *dicta*, but is not generally supported. *Harris* v. *Turnbridge* (1880) 83 N. Y. 92; *Ransom* v. *Masten* (1889) 52 Hun, 610; *Isaksson* v. *Williams* (1886) 26 Fed. 642. In this result the reason for giving effect to trade usages between principal and agent are lost sight of. Being engaged in the same business they are presumed to contract with reference to its established usages. *Phillips* v. *Moir* (1873) 69 Ill. 155. But it is manifestly unjust to make this implication against third parties not seeking to engage in the trade.

BAILMENTS—PLEDGE. The plaintiff's intestate pledged cotton to the defendant as security for a debt, The pledge was in fact invalid since part of the cotton had been bailed to the intestate and it was impossible to separate it from the cotton of which he was the owner. In an action by the administrator to recover the cotton or its value, it was *held* that he might recover possession from a mere trespasser, and that although the decedent would not have been permitted to contest the validity of the pledge, the administrator might do so. *Pierson* v. *Metropolitan Bank* (La. 1901) 30 So. 885.

Although goods which were held by a deceased person as bailee are not assets in the hands of an executor or administrator, *Smiley* v. *Allen* (1866) 13 Allen, 465, yet the personal representative may maintain trover against a mere trespasser. *Cullen* v. *O'Hara* (1856) 4 Mich. 132. By the Louisiana Code the creditors of an intestate cannot enforce payment of debts except through the administrator as their agent. Code Prac. arts. 987, 1053. The administrator therefore represents the creditors, who have done nothing to estop them from contesting the validity of the pledge, which if valid would have given the defendant a preference over the other creditors.

CONFLICT OF LAWS—CONTRACTS OF CARRIAGE. A contract for the carriage of a passenger and his baggage from Belgium to the United States was made in Belgium. By its terms the carrier was exempted from liability for his negligence. It was expressly stipulated that all questions arising under the contract should be determined by the law of Belgium, which permitted a carrier to exempt himself generally from the consequences of his negligence. *Held*, these stipulations were void without regard to the question whether the Harter Act applied to baggage. *The Kensington* (Jan. 1902) 22 Sup. Ct. 102. See NOTES, p. 160.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—GAMING INSTRUMENTS. A statute provided that gaming apparatus might be seized and destroyed under the direction of a judge or justice of a court of the State. *Held*, it was not unconstitutional as depriving persons of property without due process of law, for such apparatus was not the lawful subject of property. *Frost* v. *People* (Ill. Dec. 1901) 61 N. E. 1056.

This decision is in accord with earlier cases. *Bobel* v. *People* (1898) 173 Ill. 19. Certain things may by statute be made subject to forfeiture, if their use becomes dangerous to the public welfare. *Glennon* v. *Britton* (1895) 155 Ill. 232. In Illinois, as in several other States, such destruction is permitted only under an order of the court. The State may, however, confer this power upon any private citizen. This does not violate the Constitution by taking property without due process of law, for the police power of the State enables it to declare such objects no longer property. *Stockdale* v. *Onwhyn* (1826) 5 C. & B. 173; *Fores* v. *Johnes* (1802) 4 Esp. 97; *Underhill* v. *Manchester* (1864) 45 N. H. 214; *Meeker* v. *Van Rensselaer* (1836) 15 Wend. 397. This power has sometimes been questioned, particularly in regard to the destruction of liquor in prohibition jurisdictions. *Brown* v. *Perkins* (1858) 12 Gray, 89. Even in prohibition States, liquors may be kept as medicines, and, as such, are still property, but gaming instruments are without legal use. In them, the nuisance consists in the thing, and does not depend upon the place where they are offered to the public. The statute must be examined to see whether it withdraws rights of property unqualifiedly. A distinction must be made between the abatement of a nuisance and the destruction of the building within which it is maintained. *Brightman* v. *Bristol* (1876) 65 Me. 426. Some conflict of opinion will be found as to the constitutionality of the whole doctrine. 1 Bishop, Crim. Law, § 828; Wood on Nuisance, § 732; Bishop, Non-Contract Law, § 430.

CONSTITUTIONAL LAW—POLICE POWER—REGULATION OF TRUSTS—EQUITY JURISDICTION.—A statute of Nebraska (Laws of 1897, c. 79) defined and prohibited, as "trusts," all combinations of capital or skill, by which persons might seek to fix prices in any business with intent to prevent others from conducting a like business. It forbade agreements with those objects in view. Its provisions specifically included insurance companies, but excluded labor organizations. Remedies were given to the State and to those private persons injured by violations of this law, and corporations charged with disobeying it were compelled to pay the fee of the prosecuting attorney, if defeated in their defense, but if successful, they were compelled to pay their own fees. *Held*, the act was unconstitutional and void, because it deprived persons of their liberty by restricting their right to make contracts, and denied to some the equal protection of the laws. A second statute (Laws of 1897, c. 81) declared void all agreements between fire insurance companies in regard to the commissions to be paid their agents or the manner of transacting business. *Held*, the act was unconstitutional and void, because it deprived persons of their liberty of contract, and its enforcement by the Attorney-General should be enjoined, though he disclaimed any intention to enforce it. *Niagara Fire Ins. Co.* v. *Cornell* (1901) 110 Fed. 817. See NOTES, p. 168.

CONTRACTS—CONDITIONS—DEPENDENT PROMISES. Where in mutual covenants for the purchase and conveyance of land the vendee was to pay "upon the performance of the contract" by the vendor, it was *held* that the vendee, in an action for damages for failure to convey, need not allege tender of payment. *Maxon* v. *Gates* (Wis. Nov. 1901) 88 N. W. 54.

The court must have construed the language to mean that conveyance was to precede payment. But this seems a violent construction, especially as the agreement further provided that the vendee was to pay "on the day of the execution of the deeds of conveyance." The general rule is that payment and conveyance are *prima facie* to be performed at the same time. Harriman on Contracts, 2nd ed. § 329; Langdell, Summ. of Cont. § 133. If the natural meaning of the words had been followed the demurrer to the complaint should have been sustained. Where promises

are to be performed at the same time they are mutually dependent, though the dependency of one only is expressed. Langdell, § 21. In cases of mutual dependency the plaintiff must allege and prove at least a tender of performance. *Dunham* v. *Pettee* (1853) 8 N. Y. 508; *Swan* v. *Drury* (1839) 22 Pick. 485. Mere readiness and willingness to perform is not sufficient, unless the defendant's own acts constitute a waiver of the tender. *Lester* v. *Jewett* (1854) 11 N. Y. 453; *Heine* v. *Treadwell* (1887) 72 Cal. 217. Even in that case there must be an allegation of readiness and willingness. *McCabe* v. *Cruikshank* (1901) 106 Fed. 648.

CONTRACTS—CONSIDERATION—NOVATION. The defendant gave a written obligation to the plaintiff assuming the payment of a note of his father's held by the plaintiff. The latter refused to surrender the note and the father therefore refused to fulfill his oral promise to convey his farm to the defendant. He did, however, permit the defendant to take possession, and for twelve years the land was listed for taxation in the latter's name. In an action on the written obligation it was *held* that the defendant's occupation of the farm was a good consideration for the obligation sued upon. *Davis* v. *Ramage* (Ky. Nov. 1901) 65 S. W. 341.

If this is to be treated as an attempted novation the decision seems wrong. There can be no novation unless the prior obligation is extinguished. *Kelso* v. *Fleming* (1885) 104 Ind. 180. The only consideration with which the creditor is concerned is the release by him of his right against the old debtor. *Spycher* v. *Werner* (1889) 74 Misc. 456. Here the plaintiff refused to surrender the old note. If the case is to be treated as an ordinary contract, we find it fully as unsatisfactory. Mere benefit to the defendant with no corresponding detriment to the plaintiff is not a sufficient consideration to support an action in special *assumpsit*. Langdell, Summ. of Cont. § 64; *Riegal* v. *Ormsby* (1900) 111 Iowa, 10. A result similar to that in the principal case had been reached previously in Kentucky. *Ryan* v. *Trimble* (1901) 22 Ky. Law, 1441. See also *Cobb* v. *Heron* (1899) 180 Ill. 49.

CONTRACTS—RESTRAINT OF TRADE. *Held*, a contract in restraint of trade "which applies to the whole State is void and cannot be enforced." *Union Strawboard Co.* v. *Bonfield* (Ill. Dec. 1901) 61 N. E. 1038. See NOTES, p. 166.

DOMESTIC RELATIONS—DIVORCE—CURTESY. *Held*, a husband had no estate by the curtesy in the land of his former wife, after a divorce *a vinculo* had been granted for the fault of the wife. *Doyle* v. *Rolwing* (Mo. Nov. 1901) 65 S. W. 315.

An annulment at common law is granted only for causes existing at the time of the marriage, and renders it void *ab initio*, so that neither party retains rights in the land of the other. 1 Black. Com. 435. Modern statutory divorces are granted for causes arising after the marriage, and the relation is valid until the final decree. The objection arises, therefore, that the husband's estate in the wife's land, having become vested, cannot be destroyed, for by common law, after the birth of issue, the husband alone did homage and became the tenant of the lord. 1 Co. Lit. 30 a; 2 Black. Com. 126. The estate of the husband, before the birth of issue, is a freehold and passes by his deed alone. *Robertson* v. *Norris* (1848) 11 Q. B. 916, yet this has often been held to be terminated by divorce. *Starr* v. *Pease* (1831) 8 Conn. 541; *Barber* v. *Root* (1813) 10 Mass. 260; *Wright* v. *Wright's Lessee* (1852) 2 Md. 429. It has also been held that divorce destroys the wife's dower, although granted for the husband's fault. *Barrett* v. *Failing* (1884) 111 U. S. 523. *Wheeler* v. *Hotchkiss* (1834) 10 Conn. 225, and *Porter* v. *Porter* (1876) 27 Gratt. 599, hold that divorce destroys the husband's estate by the curtesy, although granted after issue had. In the latter case stress is laid on the point that, as the death of the wife is necessary to consummate the curtesy, a divorce, by destroying the relation of husband and wife, makes the fulfillment of this condition impossible. This argument is regarded as merely technical in the principal case, and the

court relies on the contention that an estate by the curtesy in a divorced wife's lands is inconsistent with legal rights that arise in consequence of the divorce.

EQUITY—ASSIGNMENTS—PRIORITY—PURCHASE FOR VALUE. An improvement company built a railroad in the island of Jamaica under a concession, by the terms of which certain bonds were to be held by the colonial secretary as security for the completion of the work. To raise money the improvement company executed an equitable mortgage of certain property, including the bonds in question, to the plaintiff. When the work was nearly finished the improvement company became financially embarrassed, and in order to raise more money executed an equitable assignment of certain property, including the same bonds, to the defendant, who had no notice of the plaintiff's prior mortgage, and promised to deliver the bonds as soon as they should be received from the colonial secretary. Some months later the railroad was completed and the colonial secretary indorsed the bonds and delivered them to the improvement company. The latter immediately delivered them to the defendant, transferring the legal title. The defendant did not learn of the plaintiff's claim until later, when the bonds were demanded by the plaintiff. *Held*, the rights of the plaintiff were superior to those of the defendant. *Central Trust Co.* v. *West India Improvement Co. et al.* (Jan. 1902) 169 N. Y. 3. See NOTES, p. 164.

EQUITY—BILLS OF PEACE. Holders of county bonds united in equity seeking a decree to establish the validity of the bonds. *Held*, each holder had a separate right of action, and equity had no jurisdiction on the ground of avoiding multiplicity of suits. *Washington County* v. *Williams* (Oct. 1901) 111 Fed. 801.

It appears that the defendant might have filed a bill to prevent multiplicity of actions, since it was subject to many threatened suits and the single question of the authority of the county to issue bonds was raised. *Sheffield Water Works* v. *Yeoman* (1866) L. R. 2 Ch. App. 8. The principal case presents the converse of the latter case. The plaintiffs are not threatened with vexatious litigation as each may determine his own rights in a single action. Relief is given in these cases to prevent a multiplicity of threatened suits against an individual or individuals and to restrain litigation. Unless the latter reason applies in the principal case, equity should not assume jurisdiction. Yet individual mill owners have joined to secure an injunction against diversion of water, *Ballou* v. *Hopkinton* (1855) 4 Gray, 324, and in many States taxpayers have joined to prevent illegal assessments. 1 Pomeroy, Equity, 2nd ed. 348, note. This class of cases is distinguishable in that each plaintiff, having an equitable right, there is really involved only the question of multifariousness. *Murray* v. *Hay* (1845) 1 Barb. Ch. 59. Many decisions have been rested squarely on the ground of the inadequacy of the plaintiff's remedy. *Ballou* v. *Hopkinton*, *supra*; *Cadigan* v. *Brown* (1876) 120 Mass. 493; *Osborn* v. *Ry.* (1890) 43 Fed. 824. It seems that no case has gone so far as to give several plaintiffs, with purely legal rights against a single defendant, any equitable relief.

EQUITY—POWER TO RESTRAIN A LIBEL. The defendant, in order to compel the plaintiff to advertise in his magazine, published letters purporting to have been written by sportsmen from different parts of the country, to the effect that there were certain defects inherent in the rifles made by the plaintiff, and it appeared that the defendant himself was the author of these letters. *Held*, equity could enjoin this publication. *The Marlin Fire Arms Co.* v. *Shields* (App. Div. Jan. 1902) 74 N. Y. Supp. 84. See NOTES, p. 175.

EQUITY—SPECIFIC PERFORMANCE—INJUNCTION. The defendant had entered into a contract with the plaintiff company, to take all the electricity needed by him for a period of five years, and at the end of three years broke his contract and entered into an agreement with a rival con-

cern. *Held*, the plaintiff was entitled to an injunction restraining the defendant from dealing with any other company. *Metropolitan Electric Supply Co.* v. *Ginder* [1901] 2 Ch. 799. See NOTES, p. 162.

EVIDENCE—CONFESSIONS—INDUCEMENT. The prisoner was indicted for arson. The prosecutor, whose house the defendant had burned before the arrest, said to him : "If you will tell me, I won't bother you. I won't tell anyone." Whereupon the accused confessed. *Held*, the confession was inadmissible. *White* v. *State* (Ark. Dec. 1901) 65 S. W. 937.

Coming from one who could prosecute the accused this promise related to a benefit to be derived by him with regard to his prosecution. The authorities are unanimous that at common law "any inducement in the nature of a promise or of a threat held out by a person in authority, vitiates a confession." *Regina* v. *Baldry* (1852) 2 Denison C. C. 430. So the only question here was whether the witness was one in authority. According to Greenleaf, Evidence, 16th ed. § 222, such a person is any one having authority over the accused, or over the prosecution itself, and the cases seem to hold that not only a prosecutor but even his wife, *Rex* v. *Upchurch* (1836) 1 Mood. C. C. 465, or his neighbor, *Rex* v. *Simpson* (1834) 1 Mood. C. C. 410, may be so regarded. The N. Y. Statute upon this subject has not changed the common law as to any inducement in the nature of a threat which elicits a confession. See 1 COLUMBIA LAW REVIEW, 556–557. It would seem, however, that when the inducement is in the nature of a promise, it must be made by the district attorney in order to render the confession inadmissible.

EVIDENCE—EXPERT TESTIMONY. The defendant introduced as expert testimony the evidence of stock raisers as to the effect upon cattle of a certain journey and of climatic changes, though the witnesses had no special knowledge of the effect of such a trip. *Held*, it was error to exclude the testimony. *So. Pac. Ry. Co.* v. *Arnett* (Nov. 1901) 111 Fed. 849.

The witnesses were shown to have had no experience as to the effect upon cattle of sudden changes of climate or to be specially qualified to say that cattle would suffer by such a change. There being ground for questioning the admissibility of this evidence, it would seem that the conclusion of the trial judge should not have been disturbed. This is stated as the Supreme Court rule in Rogers' Expert Testimony, 2nd ed. 22, and is supported by *Mutual Fire Ins. Co.* v. *Alvord* (1894) 61 Fed. 752. This is expressly stated in *Spring Co.* v. *Edgar* (1878) 99 U. S. 645, and in *Mfg. Co.* v. *Phelps* (1889) 130 U. S. 520. Other jurisdictions follow the same rule. *Chandler* v. *Jamaica Pond Aqueduct Co.* (1878) 125 Mass. 544; *Slocovitch* v. *Orient Mut. Ins. Co.* (1888) 108 N. Y. 56. In addition to this, the evidence was but slightly cumulative and if the rejection of it was error, it was error without prejudice.

EVIDENCE—HEARSAY—PEDIGREE. In a suit by an administrator to recover from the defendant money deposited by his intestate in the name of "son Thomas & son John," the plaintiff sought to show that the intestate never had any children. *Held*, declarations by the deceased were admissible to show this fact. *Washington* v. *Bank for Savings* (Nov. 1901) 72 N. Y. Supp. 752. See NOTES, p. 170.

EVIDENCE—RES GESTÆ. A. made a secret unrecorded deed of gift of land to his wife, who allowed him to retain possession. While in possession A. made declarations to the effect that he was still the owner of the land. In an action by creditors of A. to set aside the deed as fraudulent it was *held* that the above declarations were admissible to prove the alleged fraud. *Bent* v. *Heilbing* (Cal. Dec. 1901) 66 Pac. 967.

The authorities agree that such declarations are admissible; but they disagree as to the reasons for the rule. In some jurisdictions it is held that the grantee's allowing the grantor to retain possession raises such a

prima facie case of fraudulent combination as to justify the admission of the declarations of the grantor against the grantee as if the declarations were his own. *Byrd* v. *Jones* (1887) 84 Ala. 336. But in a greater number of jurisdictions it is held that they should be admitted merely as *pars rei gestæ*. *Loos* v. *Wilkinson* (1888) 110 N. Y. 195. Since fraud on the part of the grantor alone is sufficient to avoid a conveyance made to hinder or delay creditors, the latter ground would seem the better. It should be noted, however, that such declarations should not be regarded as part of the fraudulent act complained of, but rather as a part of another act which, being explained by the declarations, tends to determine the nature of the former. 14 Am. L. Rev. 817; 15 *id.* 1, 71. A recognition of this distinction is desirable for two reasons: first, it enables the courts to apply the *res gestæ* rule strictly without confusion, because, secondly, it relieves them from resorting to the argument that in cases like the present, as also in those of bankruptcy, *Rawson* v. *Haigh* (1824) 9 J. B. Moore, 217, the principal act may be considered as continuing for months, whereas in fact it is the intention, which prompted the principal act, that alone continues. Thayer's Cases on Evidence, 646.

EVIDENCE—RES GESTÆ. Witness heard several shots and saw two men fighting, one of whom was the deceased. As he approached, the deceased ran toward him and cried out, "They've got me!" Witness asked, "Who?" the deceased answered, "Will Carter shot me." *Held*, this statement of the deceased was part of the *res gestæ*. *State* v. *Carter* (La. Dec. 1901) 30 So. 895.

Regina v. *Bedingfield* (1879) 14 Cox C. C. 341, limiting the doctrine to declarations absolutely cotemporaneous with the act, was so severely criticized by the bench as to be deprived of much of its weight. Certainly in this country the old rule requiring perfect coincidence in point of time in order to secure the admission of the declaration as part of the *res gestæ* has been very generally abrogated and while time is still a most important test, it is not indispensable that the act and the declaration should be without any considerable interval between them. In this connection it has been said that "immediateness is tested, not by closeness of time but by causal relations." Wharton on Evidence, § 262; Hall *v.* State (1872) 48 Ga. 607. Each case however must be decided on its own facts, *Hall* v. *State*, *supra*, and depends to some extent upon judicial discretion. *O'Connor* v. *C. M. & St. P. Ry. Co.* (1880) 27 Minn. 166. The decisions are hopelessly in conflict. It is believed however that the authorities here cited are indicative of the modern trend of American law. In accord with the present case and exactly in point are *Monday* v. *State* (1861) 32 Ga. 672 and *Drake* v. *State* (1890) 29 Tex. App. 265.

MORTGAGE—AFTER ACQUIRED PROPERTY—FUTURE INCREASE. *Held*, a mortgage of cattle and their future increase gave the mortgagee no legal right or interest in such increase without a further act intervening. *Battle Creek Valley Bank* v. *First Nat. Bank of Madison* (Neb. Nov. 1901) 88 N. W. 145.

The court rests its decision on the doctrine that there cannot be a present sale or mortgage of chattels which have no present existence, and repudiates the doctrine of *Grantham* v. *Hawley* (1616) Hobart, 132. The *Grantham* case is still followed to some extent in this country, *Frank* v. *Playter* (1881) 73 Mo. 672; *Van Hoozer* v. *Cory* (1860) 31 Barb. 9; *Briggs* v. *United States* (1891) 143 U. S. 346; *Ludlum* v. *Rothschild* (1889) 41 Minn. 218, but it has been practically overruled in England, *Langton* v. *Higgins* (1859) 4 H. & N. 402. At common law, the title to mortgaged chattels passes to the mortgagee, subject to its being divested on performance of the condition by the mortgagor. Story on Bailments, § 287. Title to the increase is in the mortgagee, as the offspring belong to the owner of the dam. 2 Black. Com. 390; *Hughes* v. *Graves* (1822) 1 Litt. 317; *Evans* v. *Merriken* (1836) 8 Gill. & J. 39; *Hopkins Stock Co.* v. *Reid* (1898) 106 Ia. 78; *Pyeatt* v. *Powell* (1892)

10 U. S. App. 200. In Nebraska, however, a chattel mortgage creates merely a lien, and title remains in the mortgagor. *Musser* v. *King* (1894) 40 Neb. 892.

NEGOTIABLE INSTRUMENTS—CHECKS—REVOCATION BY DEATH. Where a bank paid a check for an amount greater than the drawer's deposit, although before presentation for payment the drawer had died and his administrator had requested the bank not to pay, it was *held* that the drawer's death revoked the check and the bank paid at its peril. *Weiand's Adm'r.* v. *State Nat. Bank of Maysville* (Ky. Dec. 1901) 65 S. W. 617. See NOTES, p. 171.

PLEADING AND PRACTICE—SINGLE CAUSE OF ACTION. The plaintiff, on whose land the defendant's wall encroached, recovered in ejectment but, failing to allege sufficient facts was denied a mandatory injunction. In a subsequent action to remove the encroachment, it was *held* that the prior judgment was a bar, since the cause of action was single. *Hahl* v. *Sugo* (N. Y. 1901) 62 N. E. 135.

Both the legal and equitable relief might have been obtained in the same action. *Corning* v. *Nail Factory* (1869) 40 N. Y. 191. That it *must* be so obtained, because the cause of action is the same, seems doubtful on principle. The primary right and duty and the delict, constituting a cause of action in ejectment, certainly differ from those in trespass or nuisance. A case may readily be imagined where the injunction could be obtained and ejectment would not lie. See *Wheelock* v. *Noonan* (1888) 108 N. Y. 179. Further, admitting that the cause of action was the same, trespass might have been maintained after the judgment in ejectment. As a continuing trespass, for which the relief in money damages is inadequate, it should be discretionary with the court to restrain the defendant. If the prayer for equitable relief were appended to an action of trespass subsequent to the judgment, the plea of *res adjudicata* would be unavailing. How it varies the case to refrain from demanding legal relief, it is difficult to see. If the pleading did not show a trespass continuing to the time of suit, no basis for equitable relief existed. If it did, a new and continuing cause of action was shown. See *contra*, *dicta* in T. B. R. Co. v. B. H. T. & W. Co. (1881) 86 N. Y. 128, and *Wheelock* v. *Noonan*, *supra*. If it be maintained that by the judgment in injectment an absolute title to the encroachment was established necessarily, it is hard to see what basis for equitable relief could ever exist on such facts.

PLEADING AND PRACTICE—VARIANCE. Goods were sold on credit with the understanding that notes should be given for the price. The purchaser failed to give the notes and the seller, before the credit had expired, sued for the price and recovered. *Held*, he should have sued for breach of the agreement to give the notes, but since substantial justice had been done, the judgment would not be disturbed. *Orr* v. *Leathers* (Ind. Nov. 1901) 61 N. E. 941.

The result here reached may be supported on the ground that the extension of credit was made conditional upon the giving of security. If so the plaintiff was entitled to sue for the full price at once. *Jaquith* v. *Adams* (1888) 60 Vt. 392. But if the promise to give the notes was merely a collateral undertaking, an action for goods sold and delivered could not be maintained until after the credit had expired. *Keller* v. *Strasburger* (1882) 90 N. Y. 379. The damages for breach of the agreement to furnish security were only *prima facie* the same as the value of the goods. *Barron* v. *Mullin* (1875) 21 Minn. 374. The plaintiff in the principal case had alleged one cause of action and proved a different one. Even under the code system of pleading this is a fatal variance. *Walter* v. *Bennett* (1857) 16 N. Y. 251; *Romeyn* v. *Sickles* (1888) 108 N. Y. 650.

PROPERTY—SEAT IN STOCK EXCHANGE. The constitution of the St. Louis Stock Exchange provided that members who were found guilty of fraud might be expelled, and that "their membership shall be disposed of by

the committee on admissions." There was no reference to the proceeds. *Held*, expulsion did not work a forfeiture of the right to the proceeds, which should, therefore, be surrendered to the expelled member or his trustee. *In re Gaylord* (Nov. 1901) 111 Fed. 771.

The Supreme Court has already decided that a seat in a stock exchange is an asset in bankruptcy. *Hyde* v. *Woods* (1876) 94 U. S. 523; *Sparhawk* v. *Yerkes* (1891) 142 U. S. 1. Accordingly, while expulsion would end the personal right to transact business on the exchange floor, it would not involve a confiscation of the property right to the money value of the seat unless it were plainly so declared in the laws of the association. The court thought the provision quoted would not bear that interpretation. The opposite conclusion has been reached in New York in construing a similar provision. *Bolton* v. *Hatch* (1888) 109 N. Y. 593. But there it is also held that a seat is not personal property within the meaning of the tax law. *People ex rel. Lemmon* v. *Feitner* (1901) 167 N. Y. 1; see 1 COLUMBIA LAW REVIEW, 494.

REAL PROPERTY—HIGHWAY EASEMENTS—ELEVATED RAILROADS. The plaintiff, owning property at the corner of Park avenue and 129th street in the city of New York, sued the New York and Harlem Railroad Co. to recover damages for injury to his land caused by the maintenance of an elevated railroad structure in the street, the fee of which was in the municipality. The company had for many years maintained its tracks in an open cut in Park avenue and the trial court found that it had acquired the right, without liability to the plaintiff, to occupy the cut. A steel viaduct for the use of the defendant having been erected in the avenue by a board of public commissioners acting in accordance with the express terms of a statute providing for the improvement of that street, the company, in 1897, removed its tracks to the structure, as required by law. Damages were demanded from the time when the defendant went into occupation of the viaduct. *Held*, the plaintiff could not recover. *Fries* v. *New York & Harlem R. R. Co.* (Dec. 1901) 169 N. Y. 270 (CULLEN, BARTLETT, and VANN, JJ., dissenting). *Story* v. *N. Y. Elev. R. R.* (1882) 90 N. Y. 122, distinguished; *Lewis* v. *N. Y. & Harlem R. R. Co.* (1900) 162 N. Y. 226, overruled. See NOTES, p. 158.

STATUTES — CONSTRUCTION — FOREIGN CORPORATIONS — NON-COMPLIANCE WITH STATUTES. The plaintiff, a foreign corporation doing business in Minnesota without having complied with the local statutes, sued in contract for goods sold to the defendant. The latter in his answer alleged the plaintiff's defiance of the law as a defense. Thereupon the company filed the necessary papers with the secretary of state, procured a license to carry on its business, and set up these proceedings in its reply. Laws of 1899, c. 68, provides: "No corporation which shall fail to comply with the provisions of this act can maintain any suit or action, either legal or equitable, in any of the courts of this state upon any demand, whether arising out of contract or tort." *Held*, the plaintiff could not recover. *Heilman Brewing Co.* v. *Piemeisl* (Minn. 1901) 88 N. W. 441.

The question of the validity of contracts made by foreign corporations which have not acquired the right to do business in a State by complying with its statutory requirements is, of course, one of legislative intent and has been dealt with in different ways in jurisdictions having statutes with identical terms. Where a corporation attempts to set up its non-compliance with the laws as a defense to a cause of action recovery is generally allowed on the theory of estoppel. Statutes merely prohibiting the carrying on of business are construed, in perhaps a majority of the cases, as invalidating all contracts made before compliance with the legislative provisions. Where, in addition to such prohibition, a penalty for disobedience is provided, the courts seem more ready to reach this result. In the principal case the inhibition of the maintenance of an action is held to make all demands growing out of the illegal business void, and hence unenforceable even after compliance with the statutes. This construction seems best calculated to render the laws effectual. It

has been adopted in two States where similar provisions are in force, *J. Walter Thompson Co.* v. *Whitehead* (1901) 185 Ill. 454; *Lumber Co.* v. *Thomas* (1893) 92 Tenn. 587, while in a third jurisdiction the opposite view has been taken. *Carson-Rand Co.* v. *Stern* (1895) 129 Mo. 381.

STATUTES—LIMITATIONS—WAIVER. *Held*, a payment made on a promissory note by one of two joint makers did not interrupt the running of the statute of limitations as against the other. *Grovenor* v. *Signor* (N. D. 1901) 88 N. W. 278.

Most of the early decisions on this question are *contra*, as is the leading case of *Whitcomb* v. *Whiting* (1781) Doug. 652, where Lord MANSFIELD said: "Payment by one is payment for all, the one acting, virtually, as agent for the rest; and, in the same manner, an admission by one is an admission by all." Lord Tenterden's Act (9 Geo. IV, c. 14) provides that an acknowledgment or new promise must be in writing in order to interfere with the running of the statute, but the rule laid down in the *Whitcomb* case seems still to govern cases of part payments in England. Lord Mansfield's view was rejected in New York in *Van Keuren* v. *Parmelee* (1849) 2 N. Y. 523 in a vigorous opinion by BROWNSON, J., who took the position that no such agency can be inferred from the existence of the relation of joint debtors, and the decided weight of authority at the present time favors this position. In fourteen States the doctrine of the English case has been expressly repudiated by statute; in eighteen others the same result follows indirectly from statutory provisions; while in seven jurisdictions, and in the Federal courts, the doctrine has been rejected by the bench. It seems still to prevail in Connecticut, New Jersey, Rhode Island, and Delaware. Wood on Limitations, 3rd. ed. §285 ff. Where the joint debtors are partners other questions are involved; the decisions in such cases seem to be widely diverse.

TORTS—ASSAULT—CONSENT. In a civil action to recover damages for an injury received in a combat to which the plaintiff had challenged the defendant, it was *held* that consent to the assault was illegal and, therefore, no bar to the action. *Lund* v. *Tyler* (Ia. Dec. 1901) 88 N. W. 333.

The line of decisions which support this rule may be traced to an obscure *dictum* that "License to beat me is void, because 'tis against the Peace." *Matthew* v. *Ollerton* (1694) Comb. 218, quoted with approval in Buller's Nisi Prius, 16. Modern writers, with few exceptions, do not question its application. Cooley on Torts, 2nd ed. 187; Bigelow on Torts, 7th ed. 10 note 1; Addison on Torts, 6th ed. §119 and note. "Consent is no defense where the act is forbidden by positive law but is, where the act is not forbidden by law though it may be by morals." *Willey* v. *Carpenter* (1891) 64 Vt. 212; *Adams* v. *Waggoner* (1870) 33 Ind. 531. The agreement to fight can be shown, not as a bar to a tort action, but only in mitigation of damages. 2 Greenleaf on Evidence, 16th ed. §85; *Barholt* v. *Wright* (1887) 45 Ohio, 177; *Gratton* v. *Glidden* (1892) 84 Me. 589. There seems to be no logical reason for this introduction of the rule of criminal law into the law of torts, for the maxim, *volenti non fit injuria*, could apply to an indictment for a crime only where the state itself had given sanction to the act, since its injury alone is there the subject of redress. Although the great weight of authority is the other way, these views do not entirely lack support. Bishop, Non-Cont. Law, §196; Clerk and Lindsell, Torts, 156; *Goldnamer* v. *O'Brien* (1896) 98 Ky. 569.

TORTS—DAMAGES—PROSPECTIVE MEDICAL SERVICES. In an action for the loss of a wife's services resulting from an injury caused by the defendant's negligence, the family physician testified that a surgical operation "might become necessary" for her relief. *Held*, it was no error to allow his testimony as to the reasonable expense of such an operation to go to the jury in the assessment of damages. *Indianapolis Street Ry.* v. *Robinson* (Ind. Nov. 1901) 61 N. E. 936.

The decision is put upon the ground that, as the husband can have but one recovery, all damages, prospective as well as past, must be included in the verdict. Undoubtedly this is sound, but the court's construction of

the term "prospective damages" seems somewhat lax and not warranted by its previous decisions. *Cleveland R. R. Co.* v. *Newell* (1885) 104 Ind. 264. In an action for the loss of services the plaintiff can recover for past expenses and those which, with reasonable certainty, will be incurred in the future. A possible consequence, however, is not a proper element in the assessment of damages. Moyne on Damages, §627; *Union Pac. Ry.* v. *Jones* (1895) 21 Colo. 340; *Streng* v. *Brewing Co.* (1900) 64 N.Y. St. Rep. 34. One of the few cases directly in point goes so far as to hold that prospective medical services cannot be considered, even when the evidence showed that they would be necessary. *Cumming* v. *Brooklyn Ry. Co.* (1888) 109 N. Y. 95.

TORTS—MASTER AND SERVANT—ASSUMED RISK. The plaintiff, an expert workman, while unloading coal from a barge, suggested that the coal be levelled, because its steepness rendered it difficult for him to avoid the backswing of the steam-shovel. The defendant's foreman answered, "In a moment." The plaintiff said, "All right." *Held*, the plaintiff continued to assume the risk and could not recover for an injury resulting from a blow from the shovel. *McClusky* v. *Garfield & Proctor Coal Co.* (Mass. Nov. 1901) 61 N. E. 804.

If the servant protests and his master persuades him that the danger is less than it is or compels further unwilling exposure, the master is liable. Bigelow on Torts, 756, 760, 761. The court decided that the foreman's answer recognized, but did not minimize the danger, and that the plaintiff's reply showed a willingness to continue a risk with which he was entirely familiar. Its conclusions seem well supported. *District of Columbia* v. *McElligott* (1885) 117 U. S. 621. According to the rule in some jurisdictions the servant may rely on the master's assurance and, for a reasonable time, at least, is not regarded as having assumed the risk. See 1 COLUMBIA LAW REVIEW, 494. Other jurisdictions adopt the rule in the principal case where the servant and the master have equal means of knowing the danger involved, but adopt the other rule where the master has the advantage in judging the dangers under which the servant works. *Marsh* v. *Chickering* (1886) 101 N. Y. 400.

TORTS—VICARIOUS NEGLIGENCE. The plaintiff, while riding on the seat of a wagon but having nothing to do with the driving, was injured in a collision with another wagon due to the negligence of both drivers. An instruction that, if the plaintiff had trusted the sole management of the team to the driver, he must show due care on the driver's part, was *held* not to be an error of which the defendant could complain. *Murray* v. *Boston Ice Co.* (Mass. Dec. 1901) 61 N. E. 1001.

The charge would have been open to objection by the plaintiff, as it involves the principle that a carrier's negligence may be imputed to his passengers, a doctrine which has been expressly repudiated in nearly all jurisdictions. *The Bernina* (1888) 13 A. C. 1; *Little* v. *Hackett* (1885) 116 U. S. 366; *Lewis* v. *L. I. Ry. Co.* (1900) 162 N. Y. 52; *Randolph* v. *O'Riordon* (1892) 155 Mass. 331. The decision last cited adopts the general rule that some such relation as master and servant must exist to impute to a passenger the driver's negligence. In the principal case the court seemed somewhat embarrassed by a former decision. *Allyn* v. *Boston and Albany Ry.* (1870) 105 Mass. 77. In that case, however, the plaintiff was denied recovery on the ground, not that his driver had been negligent, but that he himself had not used due care in riding across a railroad track.

WILLS—CONSTRUCTION—"SURVIVOR" AS "OTHER." *Held*, there is no general rule as to the construction of the word "survivors" or "surviving" in the terms of the third proposition laid down by KAY, J., in *Re Bowman* (1889) 41 Ch. D. 525, 531, namely, that the children of a predeceased tenant for life "participate, although there is no general gift over, where the limitations are to A, B, & C, equally for their respective lives, and after the death of any to his children, and if any die without children to the surviving tenants for life and their respective children in the same man-

ner as their original shares." *Inderwick* v. *Tatchell* [1901] 2 Ch. 738 (C. A.).

It is quite impossible to reconcile the numerous decisions on the construction of the word "survivor" or "surviving"; many of them seem forced and arbitrary in their results. The present decision of the Court of Appeal appears to favor such a construction in each case as seems best calculated to carry out the intention of the testator. The third proposition laid down by KAY, J., as the result of the authorities, seems to have been based on the three cases of *Hodge* v. *Foot* (1865) 34 Beav. 349; *In re Arnold's Trust* (1874) L. R. 10 Eq. 252; and *In re Walker's Estate* (1879) 12 Ch. D. 205. However, these decisions can no longer be considered as satisfactory, as is demonstrated by *Cozens-Hardy*, J., in the recent case of *Harrison* v. *Harrison* [1901] 2 Ch. 136, where the court refused to apply the rule contended for in the principal case. As showing a similar preference for a natural construction of this word, see *In re Bilham* [1901] 2 Ch. 169.

WILLS—EXECUTION—ORDER OF SIGNING. *Held*, under the New Jersey Wills Act, though all the signatures were affixed as part of one transaction, since the testatrix did not actually sign before the witnesses, the will was invalid. *Lacey* v. *Dobbs* (N. J. 1901) 50 Atl. 497.

This act is practically the same as 1 Vict. c. 26 (1837) under which the same decision was reached as in the principal case. *Goods of Olding* (1841) 2 Curt. 865; *Charlton* v. *Hindmarsh* (1842) 1 L. & T. 433. The same is true in New York and Massachusetts. *Jackson* v. *Jackson* (1868) 39 N. Y. 153; *Chase* v. *Kittredge* (1865) 11 Allen 49. A contrary decision was reached in a Pennsylvania case which represents a different, though not necessarily, an opposing line, inasmuch as the statute there does not require the testator to sign in the presence of the witnesses. Consequently, their attention does not go to the fact of such a signing. *Miller* v. *McNeil* (1860) 35 Pa. St. 217. The principal case settles the New Jersey law on the point for the first time, in accordance with the weight of authority in other jurisdictions.

WILLS AND ADMINISTRATION—POWERS OF EXECUTOR—PROFIT FROM FIDUCIARY RELATION. The defendant, an administrator, was also the mortgagee of his intestate's land. He foreclosed the mortgage, bought the property at the sale and resold it, realizing by the transaction $450. *Held*, since he acted in good faith he might retain the profit as his own. *Fleming* v. *McCutcheon* (Minn. Jan. 1902) 88 N. W. 434.

The old rule was that an administrator might not retain title to his testator's property bought, even in good faith, in his own right. *Martin* v. *Wyncoop* (1859) 12 Ind. 266; *Carson* v. *Marshall* (1883) 37 N. J. Eq. 213. *Harrison* v. *Henderson* (1872) 7 Heisk. 315 holds that he must account for any profits made in this way. The tendency seems to be to permit a purchase where it is clearly to the advantage of the estate. The law is very jealous of the executor in his relations in a personal capacity to his testator's property, and in the principal case, as in *Gillett* v. *Gillett* (1859) 9 Misc. 194, the administrator should have accounted to the estate for the profits arising from the transaction.